IN THE

SUPREME COURT

— OF THE —

UNITED STATES

October Term, 1904

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,

vs.

SOLON L. WILEY,
Defendant in Error.

No. 53

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

Having carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff in error on the ground that:

I. The finding of the Nebraska court that the plaintiff was not the real party in interest—the holder of the note—when the judgment was rendered in the Ohio court, is not a finding that that court did not have jurisdiction over the person of the judgment debtor.

The judgment of the Nebraska court in this case is affirmed by this court because it is assumed, that the finding of that court that the plaintiff in the Ohio court was not the holder of the note when judgment was rendered thereon pursuant to the terms of the warrant of attorney, established want of jurisdiction in that court over the person of the judgment debtor. If such finding establishes such want of jurisdiction then there can be no question but that the judgment of the Nebraska court was properly affirmed. The jurisdiction of any court by which a judgment is pronounced over the subject matter of the action and the person of the judgment debtor may be questioned in a collateral proceeding in another state. As to all other questions the judgment is conclusive.

Thomson vs. Whitman, 18 Wall, 457. Citing *Mills vs. Duryee,* 7 Cranch, 484. 1 *Story Commentary on the Constitution,* Sec. 1313. 1 *Kent Commentaries* 281.

To the same effect see *Simmons vs. Saul,* 138 U. S., 459.

"A judgment entered in pursuance of a warrant of attorney in a state in which such judgments are authorized, has the same force, when sued on here, (Nebraska) as a judgment on adversary proceedings."

Snyder vs. Critchfield, 44 Neb., 66 (1895).

To the same effect see *Teel vs. Yost,* 128 N. Y., 387.

The plaintiff in error however, contends that the finding of the Nebraska court that the plaintiff was not the real party in interest—the holder of the note—when the

judgment was rendered in the Ohio court is a finding as to the merits of the original cause of action in that court and is not a finding that that court did not have jurisdiction over the person of the judgment debtor.

In Anderson's Law Dictionary, subject "Merits" it is said that merits "Embraces more than the questions of law and of fact involved; all that a party may of right claim in reference to his case." (*Blakeley vs. Frazier*, 11 S. C., 134. *Dill vs. Moon*, 14 S. C., 339.)

"The real or substantial grounds of action or of defense, in contradiction to some technical or collateral matter raised in the course of the suit."

"In ordinary acceptation, the abstract justice of a case, without regard to technical or arbitrary rules of law. In legal signification, the combined questions of law and of fact presented by the pleadings in the case. But in a given case, may mean the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court." (*St. John vs West*, 4 How. Pr., 331 Selden J.)

Whenever a judgment is rendered in any action in favor of one of the parties against another, there are two questions on the merits necessarily adjudicated. One is that a liability exists against the judgment debtor; and the other is that that liability exists in favor of the judgment creditor.

Clearly in a collateral action the judgment debtor cannot question the finding of the court as to his liability,

and it would seem equally clear that he cannot question the finding of the court that that liability exists in favor of the judgment creditor.

The conclusiveness in collateral actions of such a finding—the right of a particular plaintiff to prosecute a particular action—was before the court in *Richtmeyer vs. Remsen*, 38 N. Y., 206, in which case it is said:

"In an action against a sheriff, for the escape through his negligence, of a judgment debtor, against whose person an execution had issued, and under which he was held in custody, the defense, that the plaintiff in the former suit was not the proper party to bring the action, is not available. The recovery of the judgment in that case is conclusive as to the right of the plaintiff thereto, upon the parties in this action."

Practically the same question was before the court in *Reinach vs. Atlantic, etc. R. R. Co.*, 58 Fed. 33, and it was said by Mr. Justice Brown, now of this court:

"There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi* jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. In the absence of the former the judgment of the court is void, and may be attacked in collateral proceedings, while in respect to the latter it is conclusive, and cannot be questioned except on review."

That the findings of courts in judgments by confession are conclusive upon the parties in collateral proceed-

ings is the holding of the court in the case of *Teel vs. Yost*, 128 N. Y., 387. That was an action upon a judgment of a Pennsylvania court entered by confession pursuant to a warrant of attorney. The force and effect and validity of such judgments were examined at some length by that court and the conclusion was arrived at that, given a valid warrant of attorney, such judgments were as conclusive upon the parties as judgments entered in adversary proceedings.

Among other things it is said therein:

"The appearance by an attorney, under a written power from the party, authorizing his consent to a judgment, is the legal equivalent of the process and proceedings usually taken in an action *in invitum*."

"If the court in Pennsylvania had jurisdiction of the person of the defendant and the subject-matter of the action, whatever course it might afterwards have pursued in determining the rights of the parties, they cannot be heard now to relitigate the questions considered in that action. As to such matter, upon the principle of *res adjudicata* the judgment is binding and conclusive upon the parties."

"The rule laid down in *Shumway vs. Stillman*, 6 Wend., 458, was, 'that the judgment of a court of general jurisdiction, in any state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: First, if it appears by the record that the defendant was not served with process, and did not

appear in person or by attorney, such judgment is void; and second, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him.' This case has been quite uniformly cited and approved as a leading case in subsequent cases in this state. Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon any one to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it."

"It is, and was by the laws of Pennsylvania, a valid, binding adjudication, *in personam*, against the defendant herein, and entitled, by the laws of the said state, to have the same faith and credit given to it as if it had been entered upon a verdict after a trial in which the defendant had appeared."

"We have already stated that in judgments by confession neither process, declaration, nor personal appearance are anywhere required in order to authorize the rendition of a valid personal judgment by a competent court. The appearance of the agent appointed by the party in his warrant of attorney upon the entry of the judgment con-

stitutes, to every intent and purpose, an appearance by the party, and gives the court jurisdiction to render a judgment to the effect authorized against his principal."

" 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.' "

" 'How or when this peculiar security for a debt, authorizing a creditor, as it were, *per saltum*, to sign a judgment and issue an execution without even issuing a writ, was first invented, does not appear; but it has now become one of the most usual collateral securities on loans of money.' "

"This brief historical statement of the condition of the law on the subject in this state will have failed in its purpose if it does not show that heretofore the filing in court of a warrant of attorney, authorizing the confession of a particular judgment, gave the court jurisdiction, over the person of the party executing it, to adjudicate according to its regular practice upon the subject embraced in the warrant."

"Given a valid warrant of attorney in either state, the rest is matter of form, to be regulated by the laws of the respective states where the cause of action arises."

The plaintiff in error has at all times conceded the full force and effect of the holding of this court in the case of *Thomson vs. Whitman*, 18 Wall, 457, 471, cited in the opinion in this case. In that case it was held competent

to show by evidence in a collateral action that in an action *in rem,* a sloop which had been condemned by two justices of the peace because used in raking clams in violation of law, was not seized in the county in which the condemnation proceedings were had and that consequently the justices did not have jurisdiction over the subject-matter of the action. Just as it may be shown by evidence in a collateral action in which a decree of foreclosure of a mortgage on real estate is drawn in question, that the real estate was not situate in the district in which the decree was rendered, for the purpose of showing that the court rendering the decree did not have jurisdiction over the subject-matter of the action. But clearly, evidence in such a case that in the foreclosure action the plaintiff was not the holder of the mortgage or that there was nothing due, would be inadmissable because such facts would not tend to establish want of jurisdiction in the court rendering the decree but would instead go to the merits of the original cause of action. So in *Thompson vs. Whitman.* If the contention there had been, not that the sloop was not seized in the county where the justices sat, but instead that it was being used in codfishing instead of being used in raking clams, clearly this would have involved a question on the merits only, and not a question involving the jurisdiction of the court and just as clearly a finding to that effect would not have rendered the judgment subject to collateral attack. That would have made the case of *Thomson vs. Whitman* identical with the case at bar, and identical with the case of *Simmons vs. Saul,* 138 U. S., 439, wherein it was held that it could not be shown in a collateral action in another state that the person to whom letters of admin-

istration were issued was not the person to whom the statute required such letters to be issued.

It is clear that the court in *Thomson vs. Whitman* based its conclusion wholly upon the finding that the sloop was not seized in the county where the case was heard by the justices and did not consider as jurisdictional the finding that no clams had been taken within that county on the day of the seizure. An examination of the statute of New Jersey under which the sloop was seized, was made by the court and the conclusion announced as follows:

"From this it appears that the seizure must be made in a county, and that the case can only be heard by justices of the county where it is made—'two justices of the peace of the county where such seizure shall have been made.' The seizure in this case, as specially found by the jury, was not made in Monmouth County, but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction, and the record had no validity."

It will thus be seen that the case of *Thomson vs Whitman went to the very existence of the authority itself* and not, as in the case at bar, *to an error of the court in exercising that authority.* Here it is admitted that the Ohio court had jurisdiction over the subject-matter of the action, and that the warrant of attorney authorizing the attorney at law "to appear and waive the issuing and service of process, and confess judgment" was valid and that a cause of action existed against the judgment debtor for the amount of the judgment. Opposed to this is simply the contention that the attorney at law who appeared, and the

court in which he appeared were both mistaken in a question involving the merits of the action, to-wit: That the liability found to exist from the defendant existed in favor of that particular plaintiff.

If the contention and finding in this case had been that the warrant of attorney was a forgery then a case like *Thomson vs. Whitman* would have been made out. Such a contention and such a finding would have gone to the *very existence of any authority in the Ohio court to adjudicate with reference to the rights of the defendant.* This was the holding of the court in *Teel vs. Yost,* 128 N. Y., 387, a case identical with the one at bar, wherein it is said that it would be competent for the judgment debtor "to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon;" but that inasmuch as no such proof was offered the judgment creditor was entitled to enforce his judgment.

In *Elliott vs. Peirsol* 1. Pet. 328, 340, cited with approval in *Thomson vs. Whitman,* this court said:

"When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

In *Simmons vs. Saul,* 138 U. S., 454, it is said, quoting with apporval from *McNitt vs. Turner,* 16 Wall., 366: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice,* can be impeached collaterally only for fraud. In all other re-

spects it is as conclusive as if it were irreversible in a proceeding for error."

In the case at bar it is conceded that when the Ohio judgment was rendered there was a cause of action existing against the defendant on the note for the amount of the judgment. It is likewise conceded that the warrant of attorney authorizing any attorney at law "to appear before any court of record and waive the issuing and services of process and confess judgment" was duly executed and delivered. Clearly upon such instrument being presented, it was competent for that court to determine in whose favor that cause of action existed and in determining that question it cannot be considered that it was thereby and then determining that it either had or had not jurisdiction over the person of the defendant. The production of the warrant of attorney and the appearance of the agent named therein brought the defendant before the court. The court thus having jurisdiction over the person of the defendant and also jurisdiction over the subject-matter of the action, then, under the authority of this court its judgment that the plaintiff was the holder of the note, is binding in every other court.

Wherefore, upon the foregoing grounds, this plaintiff in error and petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause.

CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
JOHN J. BOUCHER,
Attorneys for Plaintiff in Error and Petitioner.

I, John J. Boucher, of counsel for the plaintiff in error herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded, and the same is not interposed for delay.

John J. Boucher